

# **ADVANCED CIVIL PROCEDURE**

## **CASES AND MATERIALS**

### **VOLUME I**

#### **INTRODUCTION, CIVILITY, ADVOCACY, PLEADINGS AND DISCOVERIES**

**Sue Heakes  
Jon Stainsby**

**Faculty of Law  
University of Toronto  
2004**



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*Advanced Civil Procedure*  
Fall 2004

*Susan Heakes*  
*Jonathan Stainsby*

**CASES AND MATERIALS**

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The materials in this volume, with some additions and substantial deletions, are taken directly from Volumes I and II of Michael S.F. Watson's *Civil Procedures II – Cases and Materials* (January, 1999) prepared for use at the Osgoode Hall Law School. We are grateful to Mr. Watson for his permission to use these materials. The motions part of the volume was prepared with the assistance of Patrick Hill, a law clerk at the Court of Appeal for Ontario, and Shahen Mirakian, a student at the Faculty of Law. The materials were updated in the summer of 2004 with the assistance of Shirley Shamash, a summer student with Heenan Blaikie, LLP.



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*Advanced Civil Procedure*  
*Syllabus and Outline*  
Fall 2004

*Susan Heakes*  
*Jonathan Stainsby*

*Class 1 - Monday September 13, 2004*

*Introduction to advanced civil procedure*

- Course outline and introductions
- Overview of civil procedure in Ontario including:
  - structure of Court system in Ontario
  - overview of procedure in an action
  - overview of procedure in an application
  - overview of procedure on a motion
- Discussion of civility
  - *R. v. Felderhof*
  - Advocates' Society's Principles of Civility
  - courtroom etiquette – objections, “surprises”, demeanor
- Relationship with client
  - retainer letter
  - conflicts of interest
    - procedures – ethical walls

**Class 2 – Monday September 20, 2004**

***Proceedings and Pleadings – Actions and Applications***

- **Applications**
  - subrule 14.05(3) - when a proceeding may be brought by way of application
- **Actions**
  - intended proceedings (rule 37.17)
  - notice of action (subrule 14.03(2))
  - statement of claim (subrule 14.03(1))
- **Pros and Cons of the two types of proceedings**
- **Case Management (Rule 77)**
  - choice of track (rule 77.06)
  - case Management Masters (rule 77.04)
    - motions by fax (rule 77.12)
    - telephone case conferences (rule 77.13)
  - timetables (rule 77.10)
- **Parties (Rules 8, 9, 10 and 11)**
  - need to correctly identify parties
  - ensuring authority to commence proceedings (subrule 15.02(1))
  - parties under disability (Rule 7)
- **Intervention**
  - test on intervention, as an added party and as a friend of the court (Rule 13)
- **Service**
  - personal service – individuals, corporations (Rule 16)
  - alternatives to personal service (rule 16.03) and substituted service (rule 16.04)
  - acceptance of service/admission of service (rule 16.03)
  - proof of service (rule 16.09)
  - service outside the jurisdiction (Rule 17)
- **Place of Trial (Rule 46)**
- **Jury Notices (Rule 47)**

- **Pleadings and Amendments (Rule 25 and Rule 26)**
  - Counterclaims (Rule 27)
    - Against plaintiff
    - Adding defendants by counterclaim
  - Cross-claims (Rule 28)
  - Third Party claims (Rule 29)
    - strategic considerations with respect to adding parties
    - ensuring recovery (deep pockets)
    - cost consequences of adding parties
    - discovery rights
  - Limitation Periods
    - discoverability
    - when to find
  - Strategy and Advocacy Issues

**Class 3 – Monday September 27, 2004**

***Discovery (documentary and by examination for discovery), Mediation and the Deemed Undertaking***

- **Documentary Discovery (Rule 30)**
  - breadth of disclosure
  - categories of disclosure – Schedules “A”, “B” and “C” of the Affidavit of Documents (rule 30.03)
  - standard form letter re: disclosure of documents
  - production and inspection of documents (including subrule 30.04(2))
  - timing of delivery of Affidavit of Documents with respect to initiating discovery (rule 30.03 and 31.04)
  - on going production obligations (Supplementary Affidavit of Documents) (rule 30.07)
  
- **Examination for Discovery**
  - how initiated (rule 31.04)
  - who is to be examined (rule 31.03)
  - where to conduct (rules 34.02 and 34.03)
  - preparation of witnesses
  - procedure at examination for discovery (Rule 34)
  - who may attend
  - swearing in of witness (rule 34.08)
  - role of the reporter
  - role of the examining lawyer
  - role of the lawyer for the witness being examined
  - communication with witness under examination for discovery
    - cases
  - undertakings, objections and refusals
    - relevance, privilege, unclear questions, etc. (rule 31.06 and rule 34.12)
  - effect of counsel answering (rule 31.08)
  - marking of exhibits (rule 34.10)
  - information subsequently obtained (rule 31.09)
  
- **Mediation**
  - mandatory mediation (rule 24.1)
  - preparation and delivery of Statement of Issues (advocacy opportunity) (rule 24.1.10)
  - confidentiality and privilege
  - roster and non roster mediators – knowing your mediator’s background and reputation

- **Deemed Undertaking**
  - rule 30.1 of the *Rules of Civil Procedure*

**Class 4 – Monday October 4, 2004**

***Motions and Applications: Procedural and Strategic Considerations***

- Introduction
  - **What is a motion?**
    - procedural vs. substantive motions
    - considerations as to whether to bring a motion
    - to whom the motion to be brought – jurisdiction (rule 37.02 and 37.04)
    - place of hearing – where action commenced (rule 37.03)
    - legal position and research
  - **Materials**
    - Notice of Motion (advocacy opportunity) (rule 37.06)
    - grounds, detailed or not
    - what to ask for
      - things not to forget to include:
        - request for an abridgment of time
        - request for substitution of service
        - such further and other relief
  - **Evidence (Rule 39)**
    - affidavit evidence (rule 39.01)
    - who should swear the affidavit and be exposed to cross-examination
    - conduct of cross-examinations (including communication with witness a under cross-examination) (rule 39.02 and Rule 34)
    - use of discovery transcripts
    - examination of witnesses on a pending motion (rule 39.03)
    - potential for examination of witnesses at hearings
    - affidavits on information and belief (when appropriate) (subrules 4.06 (2), 39.01(4) and (5) and rule 20.02)
    - video-taped evidence – use in court room
    - exhibits
  - **Factums**  
(subrule 37.10 (6) and rule 38.09; see also rules 20.03, 21.03, 22.02, 40.04 61.11 and 61.12)
    - generally best to file one even if not required
    - use of chronologies and charts in factums
    - what the Judge will read – factum, notice of motion and probably the anchor affidavit
  - **Use of Compendia, Summaries and other aids for argument**
  - **Motions with or without notice**
    - duty of disclosure on a motion made without notice (subrule 39.01(6))

- injunctions without notice returnable within 10 days (rule 40.02)
- **Offers to Settle and Costs (Rule 49)**
  - mandatory delivery of Bills of Costs on motions (rules 57.01 and 57.03)
- **Hearing of Motion**
  - description and discussion of courtroom procedure
  - order of presentation
  - judge as audience – watch closely and expect questions and directions, prepare your script and prepare not to follow it
  - organization of argument
    - How much detail
    - How much deference
    - Expect exchanges
    - Legal argument
  - when opponent is pleading
  - when to object – pros and cons
  - argument in reply
  - oral Reasons and counsel's role during delivery of oral reasons
  - costs
    - Bill of Costs (rule 57)
    - Impact of Offer to Settle (rule 49)

### *Applications*

- Similar process
  - Resulting in a judgement as opposed to an order
  - Strategic reasons for proceeding by way of application
  - Factums required (rule 38.09)
  - Converting applications to trial or a trial of an issue (rule 38.10)



*Class 5 – Monday October 18, 2004*

*Motions for Summary Judgment*

- Rule 20 – review of materials and process
- strategic considerations
- *Vaughan v. Warner Communications, Inc.* (introduction of “new” rule)
- *Pizza Pizza Ltd. v. Gillespie* (availability and tests)
- Irving Ungerman, “Genuine issue for Trial”
- “Motions for summary judgment”
- revision of subrule 20.04(2) on January 1, 2002



Class 6 – Monday October 25, 2004

*Interlocutory Injunctions*

- **Interim and Interlocutory Injunctions**
  - equitable remedy
  - discretionary
- *Courts of Justice Act*, sections 101 and 102
- **Rule 40**
- **The Test**
  - pre-*American Cyanamid*
  - *American Cyanamid* and following
    - *Yule Inc.*
    - *C-Cure Chemical*
    - *Aetna v. Feigelman*
  - *RJR MacDonald v. Canada (A.G.)*
- **Applying the test**
  - initial threshold – serious issue
  - irreparable harm
  - mandatory and prohibitory orders
- **Urgent motions and motions without notice**
  - *Courts of Justice Act*, section 102
  - rules 37.17, subrule 39.02(6) and rule 40.02
- **Undertaking re: damages (rule 40.03)**
  - mandatory
  - strategic considerations
- **Other remedies**
  - appointment of a receiver (Rule 41)
  - certificate of pending litigation (Rule 42)
  - interpleader (Rule 43)
  - interim recovery of personal property (Rule 44)
  - interim preservation of property (Rule 45)

*Class 7 – Monday November 1, 2004*

*Costs, Class Actions, Simplified Procedure and an Introduction to Trial Procedure*

- Costs (rule 49)
  - Motions and applications
    - rule 57.01 and 57.03
  - trials
    - rule 57.01
  - tariffs – substantiated and partial indemnity
  - Bills of Costs
    - “Bullock” and “Sanderson” orders
    - preparation
  - Offers to Settle
    - cost of consequences
    - form of Offer
    - non disclosure
    - acceptance
    - enforcement of accepted offers
    - “Mary Carter” agreements and duty to disclose
  - Class Actions
    - *Class Proceedings Act*
      - certification
      - strategic considerations

*Introduction to Trial Procedure*

- Pre-trial procedures
  - Settlement conferences (rule 77.14)
  - Request to Admit
  - Experts’ reports
    - How to retain an expert
    - What to do with drafts of experts’ reports
  - Locating and preparing witnesses
  - Disclosure requirements with regard to witnesses and expected testimony
  - Use of transcripts at trial
  - Joint Document Briefs
  - Summaries and chronologies for trial judge
  - Consider use of technology at trial

### *Simplified Procedure (Rule 76)*

- Application of Rule 76 (rule 76.02)
- Affidavit of documents and list of potential witnesses (rule 76.03)
- Limitation on discovery (rule 76.04)
- Summary judgment (rule 76.07)
- Summary trial (rule 76.12)
  - Evidence in chief by affidavit
  - Limited right of cross-examination
- Costs consequences (rule 76.13)

### *Pre-trial procedures*

- Settlement conference
- Requests to admit
- Experts (pre-trial, including retainer, reports, and trial preparation)
- Witnesses – (preparation, rules respecting, and disclosure)
- Document organization
- Exhibits – joint document briefs
- Technology
- Place of Trial (Rule 46)
- Listing for Trial (Rule 48)
- Offers to Settle (Rule 49)
  - Timing
  - Acceptance and Enforcement
  - Formal compliance with the Rules
  - Strategy
  - “Mary Carter” agreements and duty to disclose

**Class 8 – Monday November 8, 2004**

***Judges and Juries and Course of Trial***

- **Introduction**
  - Overview of pre-trial and trial processes
    - Burden of Proof
    - Brief review of Evidentiary Issues
- **The Mode of Trial – Judge or Jury**
  - Historical
    - The origin of the jury system.
    - Civil Cases – Use of the Jury.
  - Respective Functions of Judge and Jury
  - What Actions may be Tried by a Jury?
  - In What Cases Should Trial by Jury be Selected?
  - Picking a Jury
  - Procedure for Selecting a Jury Trial and for Striking out Jury Notice before Trial
- **Control of the Jury At The Trial Level**
  - Dispensing with the Jury
  - Non Suit
  - The Jury's Verdict and the Judgment
    - Rules 52.08 and 52.09
- **The Course of the Trial**
  - Rules 52, 53 and 1.08
  - The Role of Counsel: Professional Responsibility

- **Presenting Evidence at Trial – Devices to Facilitate or Supplant Testimony**

- Formal Admissions
- Judicial Notice
- Presumptions
- Inspection and Taking a View
- Court-Appointed Experts
  - rule 52.03
- Medical Reports
- Examination for Discovery
  - rule 31.11
- Orders for Examinations Before Trial
  - Rule 36
- Letters of Request
- Affidavits
  - rule 52.03
- Evidence Given at Previous Proceedings

- **Split Trial (Rule 3(2))**

- **Failure to Testify**
- **Reply Evidence**
- **The Conduct of the Trial Judge**
- **When is the Trial Over? *Functus Officio***

**Class 9 – Monday November 15**

**Miscellaneous - Simplified procedure, Class actions, Costs and Enforcement of orders and judgments**

- *Simplified Procedure* (Rule 76)
  - Application of Rule 76 (rule 76.02)
  - Affidavit of documents and list of potential witnesses (rule 76.03)
  - Limitation on discovery (rule 76.04)
  - Summary judgment (rule 76.07)
  - Summary trial (rule 76.12)
    - Evidence in chief by affidavit
    - Limited right of cross-examination
  - Costs consequences (rule 76.13)
- *Class Actions* (Rule 12)
  - Class Proceedings Act
  - Certification
  - Strategic Considerations
  - Cases? Articles?
- *Costs* (Rules 56, 57 and 58)
  - Review of Rule
  - Preparation of Bills of Costs – advocacy and good docketing practices
  - Arguments
  - Security for Costs (Rule 56)
  - Assessments of Costs (Rule 58)
- *Enforcement of Orders* (Rule 60)
  - Contempt proceedings (subrule 60.11)
  - Writs of Seizure & Sale (subrule 61.07)
  - Garnishment (subrule 60.08)
  - Examinations in aid of execution (subrule 60.18)

**Class 10 – Monday November 22, 2004**

*Appeals*

- **Introduction**
  - class discussion re: history and future of and policies relating to appeals in civil cases
- **The Right of Appeal**
  - *Courts of Justice Act*, sections 6, 7, 19, 20, 21 and 110
  - appeals from interlocutory orders
    - rule 62.01
    - appeals from the order of a Master
    - appeals from the order of a Judge
      - *Courts of Justice Act* s.19(1)(b)
      - rule 67.02
  - leave to appeal
    - subrule 67.02(4)
- **Jurisdiction of the Court of Appeal for Ontario and the Divisional Court**
- **Final and Interlocutory Orders**
  - *Hendrickson v. Kallio* – does the order “determine the merits of the action and the real rights of the parties”
  - *Delaney Boat Lines*
    - the question is “so uncertain”
    - an order striking out the counterclaim is final “in this action”
  - *Laurentian Plaza*
    - motion setting aside default judgment on conditions is interlocutory
    - distinction “continues to bedevil counsel and the courts”
  - *Buck Bros. v. Frontenac Building*
    - referring a dispute to arbitration
    - final because it ends the proceeding
  - *Schmerchanski v. Lewis*
    - third party involved
    - motion to quash subpoenas granted by trial judge
    - appeal lies to C.A. finally disposed of the issue between the plaintiff (who served the subpoenas) and the “strangers”
  - *S(R) v. H(R)*
    - motion under rule 21.01 (determination of an issue before trial)
    - interlocutory order



- *Schiowitz v. IOS*
  - Two orders – one permitting service in Switzerland, one granting an injunction

- **Powers of an Appellate Court**

- *Courts of Justice Act*, ss. 119, 132, 133 and 134
  - 5 Powers:
    - (i) dismiss the appeal;
    - (ii) allow the appeal and set aside the order appealed from;
    - (iii) to make any order that the court below ought to have and could have made;
    - (iv) to order a new trial;
    - (v) to make such other order as it deems just.
  - Cannot retry the case
  - *Pelech v. Pelech*
    - question of what standard of review should be applied by Court of Appeal
    - no independent discretion unless there is “material error”
  - *McNichol v. Ardial*
    - reversing jury
  - *Sikor v. Asbestonos Corp.*
    - assessment of damages by a jury
    - CA can only reassess if counsel consent

- **Questions of Law – correctness**

- *CNR v. Bell*
  - appeal on question law under the *Railway Act*
  - dismissed – no question of law
- *Canadian Lift Truck v. MNR*
  - classification of imported truck
  - questions of law or fact?
- *R. v. Morin*
  - Application of legal principles to facts

- **Questions of Fact - palpable and overriding error**

- *Stein v. “Kathy K.”*
  - Overturn facts only if “clearly wrong”
  - “overriding error”
- *Re Equity Waste Management*
  - Appellate Court’s powers on an appeal on a written record



- **Questions of Mixed Fact and Law**
  - Palpable and overriding error
  - *Houson v. Nikolaisen*
- **Discretion**
  - Appeals from interlocutory orders
  - *Bank of Nova Scotia v. Liberty Mutual*
- **Damages**
  - *Woelk v. Halvorson*
  - *Nance v. BC Electric*

**Class 11 – Monday November 29, 2004**

*Appellate Procedure*

- **Rule 61 and 63**
  - time to appeal (rule 61.04)
  - stay pending appeal (rule 63)
  - fresh evidence and new issues (*Courts of Justice Act* s.134 (4) (b))
  - where there is no transcript
  - where there are no reasons for judgment
  
- **Jurisdiction to re-hear an appeal**

*Class 12 – Monday December 6, 2004*

*Review and Summary – Open discussion*

